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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF COAST FEDERAL BANK, FSB, UNION FEDERAL SAVINGS BANK OF INDIANAPOLIS, UNION HOLDING COMPANY, INC., MEADOWS RESOURCES, INC. AND REPUBLIC HOLDING COMPANY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 8

NO STATUTORY CHANGE COMPELLED THE BREACH OF THE GOVERNMENT'S CONTRACTUAL OBLIGATIONS CONCERNING REGULATORY CAPITAL CREDITS 8

I. A REGULATORY CAPITAL CREDIT IS NOT A FORM OF GOODWILL 8

II. FEDERAL THRIFT REGULATORS WERE NOT AUTHORIZED BY CONGRESS TO ABROGATE THEIR AGREEMENTS CONCERNING REGULATORY CAPITAL CREDITS 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 22

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983) *cert. denied sub. nom. Union Carbide v. National Resources Defense Counsel, Inc.*, 467 U.S. 1219 (1984) 22

Coast Federal Savings Bank v. Director, OTS, 785 F. Supp. 170 (D.D.C. 1991) 8

Cooke v. United States, 91 U.S. 389 (1875) 22

Jean v. Nelson, 472 U.S. 846 (1985) 20

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) 22

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 20

Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925) 22

S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) 22

Santobello v. New York, 404 U.S. 257 (1971) 22

Security Savings & Loan Ass'n v. Director, OTS, 761 F. Supp. 1277 (S.D. Miss. 1991) 9

Security Savings & Loan Ass'n v. Director, OTS, 960 F.2d 1318 (5th Cir. 1992) 9

Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992) 9

United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1876) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Mason & Hanger Co., 260 U.S. 323 (1922) 22

United States v. Spearin, 248 U.S. 132 (1918) 22

Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990) ..5, 10

Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (in banc) 5, 6, 8, 10, 13

OTHER AUTHORITIES

12 C.F.R. § 3.4 (1994) 21

12 C.F.R. § 563c.14 (1988) 13

12 C.F.R. § 567.1(w) (1995) 17

12 C.F.R. § 567.11(c) (1995) 21

12 C.F.R. § 567.5 (1995) 20

12 C.F.R. Part 3, App. A (1995) 20

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 415 (Aug. 9, 1989) § 401(h) 19

12 U.S.C. § 1441(a)(b)(10)(C)(i) 19

12 U.S.C. § 1464(t)(1)(C) 18, 20

12 U.S.C. § 1464(t)(2)(C) 18

12 U.S.C. § 1464(t)(9)(A) 18

12 U.S.C. § 1464(t)(9)(C) 18

135 Cong. Rec. S 4093 (daily ed. April 18, 1989) 12

54 Fed. Reg. 46,845 (Nov. 8, 1989) 20

TABLE OF AUTHORITIES – Continued

Page

Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 2d Sess. 24-25 (1990) 12

Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 2d Sess. 1500 (1982) 11

P. Walgenbach & E. Hanson, *Financial Accounting: An Introduction 6-7* (6th ed. 1990) 10

INTEREST OF *AMICI CURIAE*

Amici entered into contracts with the government to acquire insolvent savings and loans, or "thrifts," from federal thrift regulators that are, in relevant respects, similar to the contract entered into by respondents Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Company (collectively, "Statesman"). *Amici's* contracts, like those of respondents here, were breached when Congress enacted legislation that abrogated key terms of those contracts.[1] Most importantly for the purposes of this brief, though, the *amici's* contracts, like Statesman's contract, contain the only "express promises" the government appears to acknowledge, Pet. Br. 12, and consider to be "contractual commitments." *Id.* at 34. Those promises concern "regulatory capital credits," a form of consideration from the government distinct in kind and purpose from its promises concerning "supervisory goodwill." Unlike supervisory goodwill, no act of Congress even addressed regulatory capital credits, much less authorized the government's breach of its obligations concerning them. Accordingly, *amici* submit this brief not to reiterate the broader arguments of respondents and other *amici*, but to explain to the Court that even when the government's

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[1] *Amici* have each sued the United States in the Court of Federal Claims seeking, *inter alia*, money damages for breach of contract and for the uncompensated taking and deprivation of property in violation of the Fifth Amendment. *Coast Federal Bank, FSB v. United States*, No. 92-466C (filed July 9, 1992); *Union Federal Savings Bank of Indianapolis v. United States*, No. 93-671C (filed November 2, 1993); *Republic Savings Bank, FSB v. United States*, No. 92-265C (filed April 13, 1992).

arguments are taken on their own terms – accepting for argument's sake that the government can be immune from contract damages for a breach commanded by Congress – those arguments cannot justify immunity from damages for a breach of the government's express promises concerning regulatory capital credits.

Amicus Coast Federal Bank, FSB ("Coast") in 1987 entered into a contract with the government by which Coast agreed to relieve federal regulators of an insolvent savings and loan, thereby saving the government hundreds of millions of dollars in liquidation costs. As one part of the consideration for Coast's acquisition of the insolvent thrift, the government explicitly agreed, and the contract documents explicitly provided, that Coast would be able to record a $298.3 million government cash contribution as a direct addition to its net worth for regulatory purposes. The government's agreement regarding this regulatory capital credit was an integral premise of the entire transaction.

Amici Union Federal Savings Bank of Indianapolis and Union Holding Company, Inc. ("UHC"), (collectively "Union"), similarly entered into four separate contracts with the government by which they agreed to relieve the federal regulators of four insolvent thrifts, thereby saving the government tens of millions of dollars.[2] Again, as part of the consideration for the transaction the government

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[2] Union Federal Savings Bank of Frankton ("Union of Frankton") was also a party to those contracts and joined with the two other Union entities in an *amicus* brief in the proceedings in the Court of Appeals. In 1994, Union of Frankton merged into Union Federal Savings Bank of Indianapolis.

explicitly promised, and the contracts explicitly provided, that the resulting institutions would be able to record approximately $53 million in government cash contributions as direct additions to their regulatory net worth. The government's agreements regarding these regulatory capital credits were integral features of the deals.

In 1985 *amici* Republic Holding Company and Meadows Resources, Inc., (collectively "Republic") also entered into a contract with the government to acquire a thrift that was created by the merger of two insolvent institutions. In addition to assuming the liabilities of those institutions, Republic invested $17 million in the new thrift. In return, the government promised, among other consideration, that Republic would be able to record a $3 million government cash contribution to the new thrift as a direct addition to its capital for regulatory purposes. As with the agreements entered by Coast and Union, the government's promise concerning this capital credit was a central component of the Republic acquisition.

The government has repudiated its contractual obligations regarding, *inter alia*, the Coast, Union, and Republic regulatory capital credits, claiming it was required to do so under the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Since neither FIRREA nor its legislative history so much as mentions regulatory capital credits, in the proceedings below, and now in this Court, the government has attempted to equate such capital credits with supervisory goodwill, which is addressed by the statute. Statesman contested the government's position, but, because the Court of Federal Claims and the Court of

Appeals concluded that the government was liable for its breach of *all* its contractual promises, neither court ruled on the bargained-for capital credit separately.

Even if the government was correct – and it is not – in its argument to this Court that the government as sovereign is immune from liability in damages when a statute compels the breach of a government contract, such immunity obviously would extend only to a contract breach actually compelled by statute. In the cases before this Court, and in the cases of Coast, Union, and Republic pending in the Court of Federal Claims, this newly-fashioned brand of immunity could cloak *only* the breach of the government's contractual promise concerning supervisory goodwill, which FIRREA addresses, *not* the government's breach of its separate promise concerning a capital credit, which FIRREA does not. Coast, Union, and Republic submit this brief to explain the important distinctions – both in fact and in law – between supervisory goodwill and regulatory capital credits, and so demonstrate that the government's claim of immunity from liability for its breach of its contracts concerning regulatory capital credits is without merit.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in the three cases before the Court is whether certain government promises relating to the

[3] Pursuant to Rule 37 of the Rules of this Court, letters from the parties indicating consent to the filing of this brief have been filed with the Clerk of the Court.

accounting treatment for various assets of thrifts – part of the price paid by the Federal Savings and Loan Insurance Corporation ("FSLIC") to induce private parties to acquire insolvent thrifts and so relieve FSLIC of the insurance liability for those thrifts – are contracts requiring, at a minimum, that the federal government pay compensation for their breach. The Court of Federal Claims, *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990), and the *in banc* Court of Appeals for the Federal Circuit, *Winstar Corp. v. United States*, 64 F.3d 1531, 1551 (Fed. Cir. 1995) (*in banc*), held that by these promises the government did assume contractual obligations, and that, though the government could exercise its "sovereign prerogative" to renege on the promised accounting treatment via a legislative enactment, that is, FIRREA, the government "remains liable for breach of contract where its legislation is directed at repudiating its prior contractual agreements." *Winstar Corp. v. United States*, 64 F.3d at 1551.

Though the government generally contests the conclusion of the courts below that those promises were in fact made, Pet. Br. at 10-12, 22-36, by the government's lights even if such promises were made, "those promises would be invalid and unenforceable because the thrift regulators who would have made them would not have had the authority to bind future Congresses." *Id.* at 12. Even if the thrift regulators did have such authority, the government continues, it is not liable for contract damages when a breach is caused by a "public and general sovereign act – such as the enactment of FIRREA." *Id.* at 13.

Thus the position the government advances before this Court – that it is entitled to complete immunity for its

breach of the agreements at issue – unmistakably hinges on the claim that Congress made them do it. Though *amici* fully agree with respondents that the Court of Appeals was correct in rejecting the government's arguments, even if it was not, that would not be the end of the matter. As the Court of Appeals pointed out, though the focus of most of the cases before the Court is on the promised treatment of supervisory goodwill, Statesman also presents the distinct promise – as do the contracts of *amici* – that a portion of the FSLIC's cash contribution to the acquired institution "was to be permanently credited to Statesman's regulatory capital (*i.e.*, as a capital credit) for purposes of meeting minimum regulatory capital requirements." *Winstar*, 64 F.3d at 1537.

The significance of these distinct government promises concerning regulatory capital credits – which even the government admits are "express," Pet. Br. at 12, and give rise to "contractual commitments," *id.* at 34 – arises from the fact that, in the Court of Appeals' words, "FIRREA did not specifically cover capital credits or otherwise exclude FSLIC cash contributions from capital for purposes of determining compliance with any of the minimum capital requirements." *Id.* at 1538. If no act of Congress compels the breach of the agreement concerning capital credits, then the government's arguments for its immunity from contract damages, taken on their own terms, simply do not apply to its obligations involving capital credits. Because the Court of Appeals rejected the government's claims to such immunity *in toto*, it did not address the separate circumstances of the promised treatment of FSLIC's cash contribution as a direct credit to capital.

Quite strikingly, the government has not claimed that regulatory capital credits are addressed by FIRREA or were considered by Congress in enacting that statute. Knowing that *goodwill* is addressed by FIRREA, late in the litigation below the government began to characterize these credits as a variant of goodwill, what it calls "Regulatory Accounting Practices (RAP) goodwill." Pet. Br. at 4. Statesman disputed this characterization when it was surfaced by the government, but, again, neither the Court of Federal Claims nor the Court of Appeals ruled on this effort to equate a capital credit with supervisory goodwill in light of their conclusion that the government was liable in damages even when a breach of contract is commanded by an act of Congress.

In fact, a capital credit and supervisory goodwill are fundamentally different accounting conventions representing very different items on the balance sheets of a thrift. Federal thrift regulators themselves have long recognized these differences in their own internal guidelines governing the agreements they would make to dispose of insolvent thrifts and in their instructions to thrifts on how to record these items in their periodic financial reports. The notion that a capital credit is "RAP goodwill" is by and large a convenient invention of the government driven by this litigation.[4]

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[4] The government similarly introduced the notion of "RAP goodwill" in *amicus* Coast's litigation in the District Court for the District of Columbia. Coast contested this characterization of a capital credit at that time, submitting expert testimony to explain that the capital credit promised to Coast – nearly identical to that promised to Statesman – is not some form of "goodwill." Since the district court dismissed the case on

Similarly, neither capital credits nor "RAP goodwill" is mentioned in FIRREA or its legislative history, as the Court of Appeals pointed out below. *Winstar*, 64 F.3d at 1538. Whatever "sovereign prerogative" the government would like to persuade this Court is at stake in these cases, that prerogative cannot be stretched to include the abrogation of the promise to Statesman concerning its capital credit. At the end of the day, then, the government's breach of its promise that part of FSLIC's cash contribution to the Statesman acquisition could be accounted for as a direct credit to regulatory capital cannot be shielded from liability for damages even if this Court concludes – wrongly, we submit – that the government can breach its promise concerning supervisory goodwill with impunity.

ARGUMENT

NO STATUTORY CHANGE COMPELLED THE BREACH OF THE GOVERNMENT'S CONTRACTUAL OBLIGATIONS CONCERNING REGULATORY CAPITAL CREDITS.

I. A REGULATORY CAPITAL CREDIT IS NOT A FORM OF GOODWILL.

1. While the government makes no effort to directly challenge, much less even acknowledge, the Court of Appeals' recognition of the fundamental differences

jurisdictional grounds, it did not rule on this question. *See Coast Federal Savings Bank v. Director, OTS*, 785 F. Supp. 170 (D.D.C. 1991).

between regulatory capital credits and supervisory goodwill, it does cite two opinions from other Courts of Appeals as authority for the notion that a capital credit is simply another form of goodwill. Neither opinion persuasively supports the government's argument.

In the first, a footnote in a 1992 opinion from the Fifth Circuit, *Security Savings & Loan Ass'n v. Director, OTS*, 960 F.2d 1318, 1320 n.5 (5th Cir. 1992), the Fifth Circuit cited no authority whatever for its assertion that a capital credit constituted "RAP goodwill." The Fifth Circuit's fleeting and naked reference to "RAP goodwill" is further undermined by its failure even to acknowledge that the district court in that case had carefully distinguished its analysis of the government's promise concerning supervisory goodwill from its promise concerning a capital credit. *See Security Savings & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1279-84 (S.D. Miss. 1991). Indeed, nothing in the record of that case, including the documents memorializing the agreements, even mentioned "RAP goodwill," or in any way equated a capital credit with goodwill. *See, e.g., id.* at 1279 n.3.

The government's second reference, to *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992), is even less substantial authority for the government's argument than the Fifth Circuit's footnote. The *Transohio* court did not call a capital credit "RAP goodwill," but simply noted that the capital credit in that case was not to be deducted from the thrift's goodwill account and that goodwill was to be amortized over 25 years. *Id.* at 604. Nothing in *Transohio* makes the leap from a capital credit to goodwill sought by the government.

2. More important to dispensing with this notion of "RAP goodwill" is the fact that a capital credit and supervisory goodwill are fundamentally different accounting conventions describing the results of very different economic events. Indeed, it could accurately be said that the regulatory capital credit is not a generally-recognized accounting convention at all. The difference between the two is reflected in the internal agency guidelines that governed the promises federal regulators could make in negotiating private acquisitions of insolvent thrifts, in the very different language used in the contract documents to memorialize the bargain concerning the capital credit and the bargain concerning supervisory goodwill, and in the distinct instructions the regulators gave to thrifts concerning how to record these items in their quarterly reports.

Goodwill is a familiar concept under generally-accepted accounting principles ("GAAP"), the governing standards for accounting formulated by, among others, the Financial Accounting Standards Board. *See* P. Walgenbach & E. Hanson, *Financial Accounting: An Introduction* 6-7 (6th ed. 1990). Under the "purchase method of accounting" for an acquisition of a business, goodwill is created when the purchaser pays more than the net market value of the business. As explained by the Court of Appeals, "[a]ny excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as 'goodwill.' " *Winstar*, 64 F.3d at 1535-36, quoting *Winstar*, 21 Cl. Ct. at 113. The federal thrift regulators quite consciously

embraced purchase method accounting, a well-established technique under GAAP, to create the supervisory goodwill needed to make these acquisitions work. *See, e.g.*, Federal Home Loan Bank Board Memorandum R 31b, "Accounting For Goodwill In Accordance With GAAP Is Acceptable" (September 1, 1981) (J.A. 571-74). As the Chairman of the Federal Home Loan Bank Board ("FHLBB") explained:

> As a consequence of these new approaches, we have been able to stretch considerably the financial and human resources available to the FSLIC. . . .
>
> . . . .
>
> . . . . In essence, by using mergers as a supervisory tool. . . . , we are seeking to spread as much of the industry's own net worth as possible over the industry's trouble spots as a means of conserving the FSLIC's insurance fund.

Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 2d Sess. 1500, 1502 (1982) (statement of Richard Pratt, Chairman, FHLBB). Thus, though supervisory goodwill was critical to the viability of these deals as an amortizing asset that served to help fill up the capital "hole" of an insolvent thrift, it was essentially a mathematical artifice that cost federal regulators nothing. Indeed, it was utilized in supervisory transactions arranged by the FHLBB even when the FSLIC provided no financial assistance.

In contrast, a capital credit was a way of accounting for part or all of a *cash* contribution made by the federal regulators to the recapitalization of the insolvent thrift by

crediting that sum directly to an institution's net worth. In the Statesman transaction, $26 million of the regulators' $60 million cash contribution "was to be permanently credited to Statesman's regulatory capital (*i.e.*, as a capital credit) for purposes of meeting [FHLBB's] minimum capital requirements." *Winstar*, 64 F.3d at 1537. In effect, this capital credit represented an equity contribution by the regulators without the creation of a corresponding liability of the thrift in the form of stock.

This accounting treatment, however, did not originate in GAAP; indeed, the concept of a capital credit of this kind appears nowhere in GAAP. Rather, it is one of several accounting practices for thrifts that federal thrift regulators created over the years to further various policy objectives. Though these practices are commonly referred to as "regulatory accounting practices," or "RAP," they include two fundamentally distinct groups of accounting practices.[5] The first group includes practices generally available to all thrifts, codified in the rules of the regulators. An example of this type of RAP was the regulation allowing thrifts to recognize certain losses over a period of time, an accounting practice not allowed under GAAP.

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[5] The existence of, and need for, accounting practices for thrifts that differ in certain respects from GAAP were recognized in the congressional debates over FIRREA. *See, e.g.*, 135 Cong. Rec. S 4093 (daily ed. April 18, 1989) (star print of Senate Banking Committee report on FIRREA) ("The Committee is aware that in some instances . . . application to thrifts of [GAAP] for banks would have harsh results."). Such differences have continued even after FIRREA. *See, e.g., Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 2d Sess. 24-25 (1990) (statement of L. William Seidman, Chairman, FDIC).

See 12 C.F.R. § 563c.14 (1988) (superseded). Neither a capital credit like that at issue here, nor "RAP goodwill," appears in these rules.

The second group of RAP, unlike the first, was not generally available to all thrifts. Rather, this group included accounting treatments that were only available to thrifts on an individualized basis through negotiations with the federal regulators that arose in the context of the acquisition of a failed institution. Crediting all or a portion of the regulators' cash assistance directly to the net worth of a thrift was adopted by the regulators early in the 1980s as one non-GAAP benefit that could be offered to spur the acquisition of failed thrifts by healthy institutions.

As the 1980s progressed, the volume of thrift failures increased, as did the number of these acquisitions. To expedite the processing of these transactions, and to diminish staff time in negotiating these deals, the FHLBB, one of the central thrift regulators at the time, issued a memorandum denominating SP-37a to its Principal Supervisory Agents, providing a standard list of non-cash accounting forbearances that the regulators could offer to a healthy institution to induce it to acquire a failed thrift. J.A. 180-206. Reflecting their essential differences, a capital credit and supervisory goodwill are set out as distinct items in SP-37a. Recording the regulators' cash contribution as a direct addition to net worth – a capital credit – is set out as No. SM-1. J.A. 194. A separate item, No. SM-2, allows "unidentified intangible assets" recognized under GAAP (that is, goodwill) to be amortized on a straight-line basis over a period of time significantly longer than

that allowed under GAAP. J.A. 195. Indeed, this amortization of goodwill is itself a common difference between goodwill and a capital credit, since a capital credit ordinarily was a *permanent* addition to capital.

Further reflecting their substantive differences, supervisory goodwill and capital credits often served different purposes in the agreements by which an insolvent thrift was acquired from the regulators. The first problem to be addressed in trying to conclude such a transaction obviously was the deep insolvency of most of these institutions. Capital contributions from the private acquirer and from the regulators, augmented by the accounting device of supervisory goodwill, served to fill the acquired thrift's capital "hole." But uncertain future financial losses, threatened by various problem and/or non-earning assets still on the books of the acquired thrift, posed a separate hurdle to concluding the deal. To deal with this problem, the regulators would often make a continuing commitment of financial assistance to the thrift in the form of a yield maintenance agreement, guaranteeing a certain yield from the thrift's assets to its new owners, and/or in the form of capital loss coverage, by which the regulators agreed to share future losses, in whole or in part, of the thrift with the acquirer.

At the same time, given the growing volume of thrift insolvencies, the regulators increasingly sought to avoid or mitigate such continuing financial exposure in order to obtain a timely and definitive determination of the overall cost of FSLIC financial assistance, and to truly close their books on the institutions they were disposing of by structuring the up-front financial assistance in the deal to induce acquirers to complete the transaction with little or

no continuing involvement of the government. One such inducement was the regulatory capital credit. Simply put, the capital credit was in certain transactions a means by which the thrift regulators, by contract, shifted to the acquirer part or all of the future financial risks of problem or non-earning assets.[6] At the same time, by increasing an acquired thrift's regulatory capital, such a credit gave the institution greater leverage to make loans and investments, and thereby enhance its earning ability to offset the increased risk of future loss the acquirer had assumed. *See* J.A. 537-38.

It is not surprising, then, that the parties to these acquisitions described in their contract documents the bargained-for treatment of supervisory goodwill differently from the capital credit. The Statesman acquisition is a case in point. The treatment of supervisory goodwill, as the simple mathematical result of an accounting method, is memorialized in terms referring to "accounting [for the transaction] . . . in accordance with the purchase method." *E.g.*, FHLBB Res. No. 88-169P (J.A. 439). In contrast, the promised capital credit is not recorded by any words that suggest that it is some kind of goodwill, but in terms drawn almost verbatim from the regulators' RAP memorandum, SP-37a. *See, e.g.*, the FHLBB forbearance letter (J.A. 476) ("It is the FSLIC's intention $21

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[6] It is ironic that the blow of the regulations implementing FIRREA (but not FIRREA) fell on those institutions who were willing to accept the assistance preferred by FSLIC – the capital credit – while those who elected to receive the back-end assistance not favored by FSLIC – yield maintenance and loan loss coverage – escaped from the FIRREA regulations unscathed.

million of the cash contribution to be made to [Statesman Bank] . . . and the $5 million subordinated debenture are to be a credit to [Statesman Bank's] regulatory capital; therefore, for regulatory accounting purposes, [Statesman Bank] may book such contribution as a direct addition to its regulatory capital.").

Finally, the way the thrift regulators required capital credits and supervisory goodwill to be recorded in various financial reports after an acquisition was consummated further confirms that the regulators understood that these were two very different items. Both before and after the enactment of FIRREA, thrifts were required to file a Thrift Financial Report each quarter. Until the first quarter of 1989, goodwill was required to be reported on a line in the "Assets" section of the Report. *See* Instructions for Thrift Financial Reports, at A-27 (January 1987) (J.A. 202-206). At the same time, "permanent capital contributions by the FSLIC" were to be reported as "Contributed Capital" in the "Regulatory Capital" section of the Report. *See id.* at 203-205. *See, e.g.*, J.A. 491-93, 495-97 (examples of Thrift Financial Reports from Union of Frankton and from *amicus* Coast, respectively, for the last quarter of 1988).

The Thrift Financial Report form was changed by the regulators for the quarter ending in March, 1989. For that and subsequent reports, thrifts were directed to report any capital credit as a memo item footnoted from the capital account. Goodwill was reported as before – that is, as an item completely distinct from a capital credit. *See, e.g.*, J.A. 499-501, 503-505 (examples of Thrift Financial Reports from Union of Frankton and from *amicus* Coast, respectively, for the first quarter of 1989).

Thus, not only is there no support whatever for the government's characterization of Statesman's capital credit as "RAP goodwill," but the regulators' own past behavior contradicts such a notion. As the government itself well knows, a capital credit can no more be equated with goodwill than the event giving rise to the credit – a contribution of *cash* – can be equated with that giving rise to goodwill – a computation of the excess of liabilities over assets.

II. FEDERAL THRIFT REGULATORS WERE NOT AUTHORIZED BY CONGRESS TO ABROGATE THEIR AGREEMENTS CONCERNING REGULATORY CAPITAL CREDITS.

One looks in vain for *any* reference in FIRREA and its legislative history to regulatory capital credits, such as the $26 million credit that the federal regulators expressly promised could be booked as a direct credit to Statesman's net worth. FIRREA simply does not address these credits. To be sure, FIRREA represented a major overhaul of the thrift regulatory regime. But in that overhaul, Congress did not choose to require the exclusion of regulatory capital credits from regulatory capital. In spite of FIRREA's complete silence on the subject, the Office of Thrift Supervision's ("OTS") capital regulation placed all government capital contributions in the category of "qualifying supervisory goodwill," and so required their exclusion from regulatory capital. *See* 12 C.F.R. § 567.1(w) (1990).

As demonstrated above, a regulatory capital credit resulting from the regulators' contribution of cash to a

thrift is not, as a matter of fact, a form of goodwill. And nothing in FIRREA transformed a capital credit, as a matter of law, into a form of goodwill. Nor did FIRREA's reliance on the capital regulations of the Office of the Comptroller of the Currency ("OCC") for national banks justify OTS's classification of government capital contributions as "qualifying supervisory goodwill."

FIRREA authorized OTS to promulgate capital standards for thrifts that "shall be no less stringent than the capital standards applicable to national banks." 12 U.S.C. § 1464(t)(1)(C). The statute specifically required thrifts to maintain core capital at 3 percent of total assets, tangible capital at 1.5 percent of total assets, and risk-based capital at a "not . . . materially lower" amount than that required for national banks, except that OTS may deviate for interest rate or other risks. 12 U.S.C. § 1464(t)(2)(C). FIRREA stated that, "[u]nless the Director prescribes a more stringent definition, the term 'core capital' means core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets. . . . " 12 U.S.C. § 1464(t)(9)(A). Tangible capital means "core capital minus any intangible assets (as intangible assets are defined by [OCC] for national banks)." 12 U.S.C. § 1464(t)(9)(C).

Thus, each of FIRREA's capital standards are based on OCC standards for national banks. In drafting its regulations, OTS apparently took the position that because the OCC's regulations do not expressly *include* regulatory capital credits within core capital, OTS also could not include them as core or, consequently, tangible capital. This is not so. The OCC's capital standards made no reference to direct credits to regulatory net worth

because, as explained above, the regulatory capital credits based on the government's cash contributions were created by the thrift regulators solely for thrifts – not by the OCC for national banks. Therefore, the silence of the OCC regulations cannot be read to require, under FIRREA, the exclusion of the regulators' cash contribution from regulatory capital.

Moreover, nothing in FIRREA can be read as an implicit congressional command that all differences between bank and thrift regulation be ended, regardless of the real differences between the two industries, particularly when such a course would require the government to abrogate its contractual commitments concerning regulatory capital credits.[7] To the contrary, OTS has discretion

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[7] Indeed, if the text of FIRREA suggests anything, it is Congress' intent that the thrift regulators respect the government's agreements where Congress had not explicitly required their abrogation. Thus, while FIRREA provides that the Resolution Trust Corporation ("RTC") is to exercise all rights to reduce costs under existing FSLIC agreements, it also emphasizes that this provision is not to be construed to grant the RTC new powers to modify contract terms. 12 U.S.C. § 1441a(b)(10)(C)(i). Similarly, FIRREA provides that "orders," "resolutions," and "determinations" of the FSLIC and FHLBB – that is, the very kind of documentation in which the contractual obligation concerning capital credits is expressed – shall continue in force until modified or terminated by some provision of law. Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), § 401(h), Pub. L. No. 101-73, 103 Stat. 415 (Aug. 9, 1989). Moreover, under well-accepted canons of construction, an understanding of FIRREA that follows the text as Congress wrote it – with no change in the treatment of regulatory capital credits – is preferred because it avoids the difficult constitutional questions posed by any competing interpretation of the statute used to justify the

to deviate from the OCC's capital regulations, where, as here, there is "no counterpart" for national banks. Even OTS recognized that because of the differences between national banks and thrifts there can be no perfect marriage between the OCC regulations and its own regulations. For example, OTS added to its definition of core capital certain "nonwithdrawable accounts and pledged deposits of mutual savings associations" (12 C.F.R. § 567.5) (1995) that are not included in the OCC's definition of core (Tier I) capital. *See* 12 C.F.R. Part 3, App. A (1990). OTS characterized this deviation as one of the "primary areas of difference" between the two regulations, which it justified on the basis that the "mutual structure" of many thrifts "has no counterpart in national bank structure." 54 Fed. Reg. 46,845, 46,865 (Nov. 8, 1989). Because there is no counterpart in the regulation of national banks to the thrift regulators' practice of granting by contract regulatory capital credits to induce the acquisition of failed thrifts, including such credits in core capital, as bargained for by the acquirers and promised by the government, would not run afoul of FIRREA's requirement that OTS's core capital standards be no less "stringent" than the OCC's definition. *See* 12 U.S.C. § 1464(t)(1)(C).

Furthermore, the OCC's capital regulation expressly reserves authority to permit national banks, on a case-by-

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abrogation of vested contract rights concerning the treatment of capital credits. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (court must avoid constitutional adjudication where possible); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (statutes must be construed, if feasible, to avoid serious constitutional concerns).

case basis, to include in core capital any type of capital instrument. 12 C.F.R. § 3.4 (1990). OTS promulgated a parallel regulation reserving similar authority. 12 C.F.R. § 567.11(c) (1990). Accordingly, OTS was clearly entitled to invoke this authority to permit the capital credits, not otherwise restricted by FIRREA, to be included in regulatory capital, particularly when doing so fulfilled legitimate contractual obligations of the government. Certainly doing so would not render its regulatory requirement any "less stringent" than that of OCC.

Finally, although FIRREA required the exclusion of at least some "intangible assets" from both core and tangible capital, this provision has no effect on whether the capital credit may be included in regulatory capital. For the capital credit is not an "asset," intangible or otherwise; it is not listed among a thrift's assets on its balance sheet. Instead, prior to FIRREA, a capital credit was *directly* credited to a thrift's net worth.

It is clear, therefore, that OTS' decision to restrict the inclusion of capital credits in regulatory capital was its own, and was not compelled by Congress. As a result, there is no excuse for the failure of the government to honor its contractual commitments concerning capital credits, even under its understanding of the law.[8] For, as

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[8] Perhaps sensitive to this logic, the government also argues that it made no real contractual commitment to Statesman concerning capital credits because the provision of the Assistance Agreement memorializing this commitment notes that such credits "shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations)," which the government claims means that this credit is subject to future

the government conceded in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), when vigorously advancing the contention that the federal government has a right to repudiate its contracts, this alleged right of repudiation "only comes into play, of course, when *legislative* actions modifying contractual obligations are challenged. It obviously does not give executive officials license to repudiate authorized contractual undertakings." Brief of the United States, p.35 n.25, *POSSE* (emphasis in original). *See also Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Put simply, if there is no conflict between the government's obligations under its contracts and under the law, it must honor both.[9] Even under the government's reasoning,

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changes in those regulations. Pet. Br. 34-35. The government can make this argument only by ignoring other provisions of the Statesman agreement, including the FHLBB Resolution that also promised the capital credit but without any reference to other regulatory definitions, J.A. 458, and the Assistance Agreement itself, which provides that the FHLBB Resolution will override any future change in the regulations. J.A. 403. Thus, the contractual commitment of the government concerning capital credits is unmistakable.

[9] *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1946); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925); *United States v. Spearin*, 248 U.S. 132, 138 (1918); *United States v. Mason & Hanger Co.*, 260 U.S. 323, 325-26 (1922); *Cooke v. United States*, 91 U.S. 389, 398 (1875); *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 323 (1876); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub. nom. Union Carbide v. National Resources Defense Counsel, Inc.*, 467 U.S. 1219 (1984).

then, the government's abrogation of its promises concerning capital credits constitutes a breach of contract for which the government is liable.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals for the Federal Circuit in all respects. If, however, this Court concludes that the government is immune from liability in damages when a statute compels the breach of a government contract, this Court should nevertheless affirm the Court of Appeals to the extent it held the government liable in damages for breach of its contractual promises concerning regulatory capital credits.

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Respectfully submitted,

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